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No. 2705.

IN THE UNITED STATES

Circuit Court of Appeals

For the Ninth Circuit

THOMAS R. SHERIDAN,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

BRIEF OF THE UNITED STATES.

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WRIGHT-LANGE PRINTING CO.

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STATEMENT OF FACTS.

In the main, the statement of fact as given in the brief of the plaintiff in error, hereafter called the defendant, is correct, and insofar as they accord with

the views of the government the same are adopted as the government's statement of facts, but there is necessity that the Court be apprised of several material changes and additions:

Mr. Thomas R. Sheridan, in addition to being a director of the First National Bank of Roseburg, was its president from 1891 up to the time of its consolidation with the Douglas National Bank, about June, 1911.

Of the eight counts contained in the indictment, there was conviction upon two, to-wit, the first and fourth.

The abstraction from the account of David Hull was charged in the first count in the indictment. The impression is left from the testimony of David Hull, as quoted on pages 5 to 9 of plaintiff's brief, that David Hull was a man of ordinary intelligence and capable of transacting his business, but the residue of the testimony of David Hull discloses that he could neither read nor write (Tr. p. 42); he worked twelve or fourteen years in a livery stable at Roseburg, Oregon; that he knew Mr. Sheridan for many years, had confidence in his honesty and integrity, and was a depositor in the First National Bank of Roseburg for about twelve or fourteen years (Tr. pp. 39, 49.)

Much of the evidence introduced by the government goes to show that the sums taken out of the accounts of the individual depositors by system of

memorandum checks adopted in the bank, were simply transferred as credits to accounts of either the defendant or his associates. The defendant Sheridan claims that there is no evidence that any checks were ever drawn against the credits so entered in favor of the accounts of the defendant or of his associates. For example it is claimed by defendant (def'ts brief p. 8) that there was no evidence whatever that any checks were ever drawn against the credit entered in Agee's account, either by Agee or the defendant or anyone else.

In this particular the evidence does show that the defendant handled the money of Agee and himself (Tr. p. 185) and financed B. C. Agee, and took care of their joint farming business (Tr. p. 185), and this money abstracted by the defendant from the account of David Hull went into the B. C. Agee account. (Tr. pp. 66, 67).

The government offers to the Court two theories either one or both showing conclusively that the First National Bank of Roseburg had money abstracted from it by the defendant within the meaning of section 5209 Revised Statutes of the United States.

1. The defendant drew a memorandum check (Government's Exhibit No. 4,) dated March 4, 1911, to the order of B. C. Agee, which he signed with the name of B. C. Agee by himself. This memorandum check was against the general checking account of

David Hull. There is no showing when the book was balanced and returned to Hull, but the first information contained which Hull could have received with regard to this abstraction was his receipt of a letter from the bank examiner, Mr. Goodhart, subsequent to June 20, 1911, (Tr. p. 47). His receipt and signing of this letter from the bank examiner was carefully explained (Tr. p. 56 to 58). The defendant admits (Tr. p. 213) that he drew this memorandum check in order to take the money out of the account and put it out at interest, and that the sum so designated on the memorandum check was withdrawn from the depositor's account (Tr. pp. 213, 214). The defendant also executed a promissory note (Government's Exhibit No. 6) dated March 4, 1911, for $230.00, payable on demand to David Hull which was signed by the defendant with the name of B. C. Agee, by T. R. S. (Tr. p. 64). The defendant further admitted (Tr. p. 213) that the sum of $230.00 went to the credit of B. C. Agee's account, and on March 4, 1911, the account of B. C. Agee was shown by the books to be credited with $230.00 (Tr. pp. 66, 67). While Mr. Agee never signed this note to David Hull, and never had any talk with the defendant in which he authorized the defendant to sign the note for him, and knew of this note for the first time upon the assignment for the benefit of creditors by the defendant (Tr. p. 103); the defendant was a partner with Agee in the orchard and farm (Tr. p. 102), and the defendant

looked after the financial part of that partnership (Tr. p. 103); therefore, the money being put in the partnership account of the defendant, was, for all practical and legal purposes, entirely in his control, and over which he exercised absolute disposition.

It is proper at this point to show that the account of Mrs. Laura M. Verrell does not differ from that of David Hull in that the money abstracted by the defendant went to his use and benefit. This is shown by the following evidence:

The defendant drew a memorandum check No. 9, against the account of Mrs. Laura M. Verrell, which check was dated April 15, 1911, and was for the sum of $5,000, and is admittedly signed by and in the handwriting of the defendant (Tr. p. 73). Page 386 of the individual depositors' book shows that on April 15, 1911, the account of Mrs. Verrell was debited $5,000, with the statement that it was "loaned by T. R. S.," and the defendant thereupon admitted that this $5,000 was transferred to his account on the books (Tr. p. 88).

Both the sums described in counts one and four of the indictment upon which the defendant was found guilty are therefore shown to have been taken from the accounts of the individual depositors and placed to the credit of the defendant in his account with the First National Bank of Roseburg. This debiting of the sum in the depositor's account and crediting the same in the defendant's account, was

admittedly without the authority of the directors of the First National Bank of Roseburg (Tr. pp. 188-190), and the jury found upon the evidence submitted that such conduct was without the authority of the depositors, by their verdict.

It is claimed by the government on its first theory of the abstraction, that this taking of money from the individual accounts of the depositors without the authority, as aforesaid, and placing the same in the individual account of the defendant, was an abstraction within the meaning of section 5209 of the Revised Statutes, because the bank was effectually deprived of the use of that money to meet any demand which might be made upon the individual account by the depositor and the injury which the statute seeks to prohibit was by that abstraction as effectually accomplished as though the money had been directly taken out without the intervening means of the defendant's account.

The indictment alleges that the moneys, funds and credits of the said National Banking Association were held by said association, "as a deposit for the sole use and benefit of one David Hull," or, "for one Laura M. Verrell," each being "a depositor and creditor of said The First National Bank of Roseburg." When the money was abstracted from said account to the use and benefit of someone other than the depositor, the bank was liable to that depositor for the money received from him, and because of

the unlawful abstraction of the defendant there was not the proper amount in the bank to the credit of the depositor from which to meet any demand obligation. The abstraction charged in the indictment is not a general abstraction from the bank, but an "abstraction and conversion to his, the said Thomas R. Sheridan's own use and benefit * * * from out of the moneys, funds and credits of the said National Banking Association, held by said National Banking Association as a deposit for the sole use and benefit of" the particular named depositor. Therefore, when the defendant caused the money of a depositor to be taken out of his account, leaving the account in overdraft, as was sometimes the case, and credited to his own account or the satisfaction of an overdraft in some of the accounts of his associates, as was other times the case, the money was not available by the bank for the use of the depositor because there was a larger demand upon the bank from another account. Whether these deposits so abstracted were in the defendant's pockets or in his account, which he could demand from the bank at any time, the abstraction so far as the bank's ability to lawfully comply with the demand of the depositor and the demand of the defendant was concerned, was complete.

2. However, it is not necessary that this theory of the government be resorted to in order to show

that the abstraction of the money of the depositors actually occurred. After the evidence shows, as above noted, that these sums of money went into the personal account of the defendant he repeatedly states in his own testimony that he "took" the money, "loaned it," "handled it," that he had "taken the money out," and "loaned it out again" (Tr. pp. 221 to 220, inc.), which phase of the case will hereinafter be more particularly dealt with.

The defendant states in his brief (p. 17) with much emphasis, that "all of the depositors, including David Hull and Mrs. Verrell, signed the releases and forwarded them to the examiner."

These so-called releases were letters written by Richard W. Goodheart, the bank examiner sent to the First National Bank of Roseburg, to the individual depositors upon whose accounts he found these memorandum checks drawn, with the statement that he, the bank examiner, was informed by the defendant that the individual depositors had warranted the loaning of this amount of money, stating the amounts, and date, and inquiring if such were the case, then below the signature of the bank examiner to that letter was a certificate certifying that authorization had been given to Mr. Sheridan to loan the amounts then specified and naming the parties to whom the loan was made, with a blank place for the signature of the depositor, if he cared to certify to the same.

This certificate was relied upon by the defendant, as it is advanced on the ground of authorization in this case.

While the defendant had had a conversation with most of the depositors concerning the loaning of their money, the jury found by their verdict in the counts alleging abstractions from the deposits of David Hull and Laura M. Verrell, that these conversations never amounted to authorizing the defendant to loan their money. The conclusion of the jury on this point was drawn from the following explanation of David Hull as to how he came to sign the so-called release.

> "Q. When did you first learn that your money was loaned to Mr. B. C. Agee?
>
> A. Well, I got a letter from the National Bank Examiner; got it out of the post office; took it to Mr. Hedgpeth; had him read it, and he said, 'That is all right,' so I had him sign my name. That was the first time I knew my money had been loaned to Mr. Agee. I cannot read or write." (Tr. p. 42).

Again:

> "Q. I hand you here a letter written to you under date of June 20, 1911, the original of a letter addressed to Mr. David Hull at Roseburg, Oregon, purporting to be signed by Richard W. Goodheart, National Bank Examiner, with release at the bottom signed by David

Hull, and ask you whether or not you wrote that. Did you write your signature here?

A. No, sir, I did not.

Q. I wish you would tell the jury in your own way how you came to sign that or authorize that to be signed.

Mr. Fulton: He says he didn't sign it.

Q. How did you come to authorize this to be signed?

COURT: He testified a while ago somebody else signed it at his request.

Q. Tell about that time with Mr. Hedgpeth.

A. I got that letter, that I am going to tell you, and took it down to the stage barn and Mr. Hedgpeth was there and I had him read it and he said 'That is all right, sign it,' and I said, 'if it is all right I will sign it,' and I did, and I took it and put it in my pocket and I didn't give it to Mr. Sheridan until next morning and I met him at the bank, on the sidewalk outside, and he read it and went on in the bank and that is all there was to it." (Tr. p. 43).

which testimony is corroborated by the statements of Mr. C. W. Hedgpeth, as follows:

"I am working for the Roseburg-Myrtle Point Stage Company. I signed the name of David Hull to the release (defendant's exhibit 1). The circumstances have been pretty well stated by Mr. Hull. The document was brought

—I supposed from the bank, at the time he brought it, he asked me to read it for him and I did so, and he asked me if I thought it was all right and the meaning of it, and I gave him my interpretation of the meaning of it, that it was a request from the bank to allow Mr. Agee to have $230 of his money, then on deposit in the bank, and he said that was all right, to sign it, and I signed his name." (Tr. pp. 59, 60).

With regard to the signing of the so-called release by Mrs. Laura M. Verrell, upon which the defendant places equal stress, the circumstances under which she signed the letter of the bank examiner are detailed by the evidence as follows:

"Q. Now, here is a letter dated June 20, 1911, written to you by a National Bank Examiner, Goodheart, purporting to be signed by you. I would like to have you look that over, Mrs. Verrell, and tell the jury whether or not you signed it, and if you did, the circumstances under which it was signed.

A. Yes, I signed that.

Q. Just go ahead now, in your own way, and tell the jury how you came to receive it and how you came to sign it.

A. Mr. Sheridan told me that I would receive that letter and when I received it to sign it and send it back to the bank examiner, which I did, but not before he saw the letter.

He saw the letter, I took it to him after I had signed it, I signed that letter in my home and I took it to him and he looked at it and read it over and looked at it and he said it was all right and he put it in the envelope and sealed it himself, but that letter was misrepresented to me." (Tr. pp. 78, 79).

And again,

"Now, tell the jury in your own way the circumstances under which you took it (meaning the letter from the bank examiner) to the bank and to whom you delivered it.

A. I took it to the bank and showed it to Mr. Sheridan; he was at his desk, writing; I showed it to him and told him I had received the letter which he told me I would receive from the Examiner, and would like for him to look it over and see if it was all right before I sent it, which he did." (Tr. p. 80).

which testimony is, to a large extent, admittedly corroborated by the defendant himself:

"Mrs. Verrell brought the release document in to me and she said, 'Mr. Sheridan, I received this document; what shall I do with it?' I said, 'If it is correct, Mrs. Verrell, why sign it.' I did not see it or take it in my hands at all. She laid it on the desk there, but I did not pick it up." (Tr. p. 218).

Defendant boldly states that all depositors signed

the releases and forwarded them to the examiner. (Defendant's brief, p. 17).

The transcript of record with which counsel for Defendant is familiar clearly shows that J. E. Hainey, (Tr. pp. 107, 108), W. E. Chapman, (Tr. pp. 112, 116), H. P. Marks, (Tr. p. 141), E. E. Haines, (Tr. p. 155), Mrs. Elizabeth Byron, (Tr. pp. 186, 187) and J. F. Hoover, (Tr. pp. 192, 193), never did sign any of the releases in question.

In other instances depositors signed these so-called releases purely as a favor to their banker, not thinking that the bank examiner would care, but knowing the authorization was not true. (Tr. p. 146).

Other depositors saw Thomas R. Sheridan, the defendant, and he advised them to sign these so-called releases stating in most of those cases that the signing of these releases was a mere matter of form (Tr. pp. 149, 157, 159, 166, 176, 179).

It is well at this point to follow up the statement of the defendant that all depositors signed these so-called releases, and the further statement that the defendant was authorized by all these depositors to make the withdrawals of this money by the evidence, that in some instances at least, where the money was abstracted from the depositors' accounts there was no conversation with the defendant regarding any loan of the depositors' money.

Such cases are those of H. P. Marks, (Tr. p. 138), C. J. Marks, (Tr. p. 142), Edward C. Marks, (Tr. p. 146), and John E. Marks, (Tr. p. 156), and the memorandum checks which were drawn against these depositors' accounts were therefore unauthorized.

In other instances the conversation concerning the loaning of the money was had after the money had actually been taken from the account of a depositor. Such cases are those of W. J. Carlon (Tr. pp. 90, 91) and E. E. Haines, (Tr. p. 153).

In most instances the depositors did not know that the defendant was going to or had loaned the money to himself or his associates, and with one or two exceptions none of these depositors knew of the notes which were signed by the defendant in his own name, or in the name of his associates by himself until after it was brought to their knowledge by either the state or federal investigation. These notes were always placed in the bank vault and never delivered to any of the defendants, as testified to by J. E. Haney:

> "The Government offered and there was received in evidence a promissory note of date May 24, 1911, in favor of J. E. Haney, in the sum of $5,000, with interest at six per cent, payable on demand, the defendant admitting that the instrument is entirely in the handwriting of the defendant. It was marked Govern-

ment's Exhibit No. 16.

Witness continuing: I never seen this.

Q. You never saw the note?

A. No.

Q. Did you ever see this note before I handed it to you at this time?

A. No." (Tr. p. 108).

and by J. D. Cooley,

"I first saw these notes in the office of the United States Attorney, and prior to that time I had never seen them." (Tr. p. 167).

and by George P. McNamee:

"In regard to the promissory note, Government's Exhibit No. 70, the first time I ever saw it was when you showed it to me just now."

With respect to whether the depositors knew from their bank books after they were balanced, or the memorandum checks which were returned to them with their own checks, of the fact of the abstraction, David Hull, for example, could not read or write (Tr. p. 482), and what business he had as to reading or writing was done by others in apparently as poor a state of education as himself. Some of the depositors got their statements once a year (M. S. Doerstler, Tr. pp. 119, 126). Some received their memorandum checks when their books were balanced every two or three months, or a shorter time (Tr. pp. 137-150). The bank books of other depositors did not show that the money was taken from the account though they

did show that interest was received, presumably from the bank (Tr. pp. 145, 156); and in cases where it was shown that the memorandum checks by which the abstractions were made were brought to the notice of the witness, the witness did not know what the memorandum checks meant (Tr. pp. 75, 108, 110, 155), or thought that the bank had loaned the money as a bank (Tr. 155); and in another instance, the first time the witness ever saw the memorandum check was when the same was exhibited to him at the time of the trial (Tr. p. 170). Others did not see the memorandum check for nearly three years (Tr. pp. 138, 140), or, as testified to by Mr. Haines, (p. 154),

> "The memorandum check was in the statement that was returned to me; I did not understand one thing in the world about it; I just supposed the bank had loaned money as they said they would, and I did not understand it at all. Did not know no more what it meant than nothing in the world; I never did know until now that I had Mr. Sheridan's personal note for the amount;" (Tr. p. 154.)

And the defendant also argues from the execution of these notes and the payment of interest upon either the notes or the entrance of interest in the bank book that an awareness should have come to the depositors of the loan of their money.

It of course was impossible for any awareness to come to these witnesses, most of whom were not

even aware that the notes executed by the defendant and upon which interest was entered were in the vault of the First National Bank of Roseburg. In cases where the depositors found interest accredited to them in their bank books they thought that the amount had been borrowed by the bank and that interest came from the bank itself. An example of this is Mrs. Laura M. Verrell (Tr. p. 86). In other instances the record does not disclose whether interest was ever paid to the depositors or not and in still other instances no interest was paid nor even the principal debt.

Before proceeding with the discussion of the legal principles alleged to have been raised by the defendant's brief, counsel, after reading said defendant's brief, feels constrained to quote the remark of Mr. Justice Brown in the case of Cochran and Sayre vs. United States (1894), 157 U. S. 286:

"Few indictments under the national banking law are so skilfully drawn as to be beyond the hypercriticism of astute counsel—few which might not be made more definite by additional allegations. But the true test is, not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." (p. 290).

From the authorities cited hereafter it is believed that the alleged errors in this case will appear to the Court "hypercritical."

Hereinafter will follow particular points in support of the indictment, but now, as general authority for its correctness, it is stated that with the exception of the introductory portion which was taken from another approved form, the indictment is based and follows the second count of the indictment in the case of United States vs. Northway, which was held by the Supreme Court of the United States to be good.

United States vs. Northway, 120 U. S. 334 (1887).

A certified copy of that portion of the Northway indictment which was followed in this case is hereto appended as "Appendix A."

POINTS, AUTHORITIES AND ARGUMENT.

DIVISION I.

INDICTMENT.

(Note) An endeavor will be made throughout the rest of this brief to answer section by section, and paragraph by paragraph, where the same may appear necessary, the arguments advanced in the corresponding sections and paragraphs of the defendant's brief.

1. (Defendant's brief p. 22).

The first error assigned and argued with reference to the indictment in this case is that each count thereof charges that the defendant unlawfully abstracted and converted to his own use money held by the bank for "the sole use and benefit" of certain depositors, and that section 5209 intended to charge a crime only when the money was held by the bank as a bank and not as a bailee. Therefore, the money being that of the individual was a special deposit and it was no offense against the laws of the United States for the defendant to abstract it, but if an offense at all would come under the state law.

The question of the validity of the indictment upon this point is determined by the conclusion as to who, (the bank or the depositor) owns the money deposited with the bank by these depositors.

The fallacy of defendant's argument is based upon the erroneous conclusion of law that the money deposited by general depositor, as is the situation in these cases, is owned by the depositor. It is owned by the bank. This conclusion is shown by the following authorities:

(a) Unlike checks, cash deposited by customers with the bank ceases to be the property of the depositor and becomes the property of the bank creating at once the relation of debtor and creditor.

Balbach, et al, vs. Frelinghuysen, Receiver,

etc., 15 Fed. 675,

Marine Bank vs. Fulton, 2 Wall. 252, 256.

Also other authorities cited in the defendant's brief at pages 61, 62 and 63, where claims are made inconsistent with defendant's claims in this section.

(b) Deposits on general account belong to the bank and are part of its general funds; the bank becomes a debtor to the depositor to the amount thereof, and the debt can only be discharged by payment to the depositor or pursuant to his order.

Aetna National Bank vs. Fourth National Bank, 46 N. Y. 82.

(c) Deposits of money in a bank are either general or special; a general deposit is one which is to be repaid on demand in money and the title to the money deposited passes to the bank; a special deposit is one in which the depositor is entitled to the return of the identical thing deposited, and the title remains in the depositor.

Bank of Blackwell vs. Dean, (1900) 2 Banking cases, 232, 9 Okla. 626.

(d) Deposits of money made in a bank in the ordinary course of business are presumed to be general deposits.

Bank of Blackwell vs. Dean, (supra).

The indictment also alleges that the moneys, funds and credits abstracted were those of the said National Banking Association.

The indictment further alleges that these moneys, funds and credits were "held by said National Banking Association as a deposit" (not a special deposit) "for the sole use and benefit of" the depositor. What interpretation is to be attached to the term "held as a deposit for the sole use and benefit of the depositor" is determined by the above authorities and is to the effect that the bank owns these deposits and holds them as a debtor for payment on demand by the creditor.

That the relation of banker and depositor is that of debtor and creditor is well established.

North Madison Bank, Fed. C. 890, 5 Bliss 515;

Mathew vs. Creditors, 10 La. Ann. 344;

Nat'l Bank vs. Elliott Bank, (Mass.), 5 Am. Law. Reg. 711;

Knecht vs. U. S. Sav. Inst., 2 Mo. App. 563;

Aetna Nat'l Bank vs. Fourth Nat'l Bank, 46 N. Y. 82;

Baker vs. Kennedy, 53 Tex. 200.

The authorities upon this alleged point cited by counsel, when they touch the point at all, relate to special deposits with which this case is not concerned.

2. (Defendant's brief, p. 27).

Here error is alleged in that if the offense charged in the indictment is a misdemeanor, then as no punishment has been provided for it by Con-

gress the indictment does not state an offense against the United States.

Section 5209 Revised Statutes provides as follows:

> "Sec. 5209. (Embezzlement; penalty.) Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

And apparently therein named the crime as a misdemeanor and provides the punishment therefor.

It is true that section 335 of the federal penal code of 1910 (35 Stat. L. 1152) classifies felonies and misdemeanors as to whether or not the punishment exceeds one year in which the crime is deemed a felony.

But this Act of Congress dated March 4, 1909, (35 Stat. L. 1088, 1152) in section 341 especially mentions all sections and acts which are repealed and does not mention R. S. Sec. 5209.

And where a statute expressly repeals specific acts there is a presumption that it is not intended to repeal others not specified.

> Meese et al. vs. Northern Pac. R. R. (C. C. A. 9th, 1914), 211 Fed. 254, 262.

Since this was not a common law offense, Congress has the right to define the crime and state what the punishment shall be for the violation. The difference between misdemeanors and felonies is so well known as to require no particular mention; by classifying this crime as a misdemeanor there are certain penalties which were not imposed upon the defendant which otherwise would have been incurred for the violation of a felony.

3. (Defendant's brief, p. 31).

This section 3 and its subdivisions, claim that the indictment is defective because of particular reasons taken up in each one of the six subdivisions. The argument used in all of this division is predicated upon a major premise that the defense

charged in the indictment is a felony and afterwards mentions six minor premises from which six conclusions fatal to the indictment are drawn. All of these conclusions are erroneous because the major premise, that the indictment charges a felony, is erroneous.

The indictment charges a misdemeanor on the authorities cited in section 2 (supra) and herein.

It is, therefore, unnecessary to answer conclusions based on a false premise excepting so far as other points are involved.

a-i. Of course, the authorities for the indictment drawn in section 5209 R. S. have not been overruled by the Act of Congress enacting the penal code of 1910. Defendant's counsel himself, after this alleged conclusion, proceeds to quote largely from these authorities which he claims are overruled. His position is inconsistent. Presumption is always in favor of validity and against repeal.

While the question has never been directly raised so far as research has disclosed, cases are prosecuted and sentences instituted under this section without even the point raised by astute counsel, being considered.

ii. Since section 5209 R. S. itself declares this crime to be a misdemeanor, then the indictment must charge the crime with sufficient particularity to satisfy the statute and the general rule of indictments, to-wit, to sufficiently apprise the accused of

the crime which he is alleged to have committed.

In addition to the statement that this indictment follows one already adjudicated on the Supreme Court, the following authorities have been collected in the case of United States vs. Britton (1882) 107 U. S. 655,661, where Mr. Justice Wood collected the authorities on the sufficiency of an indictment charging a misdemeanor under this statute as follows:

> "The section of the Revised Statutes upon which the indictment is based creates and described certain offences, and expressly denominates them misdemeanors. In United States vs. Mills, 7 Pet. 138, 142, it was said by this court that 'the general rule is that in indictments for misdemeanors created by statute, it is sufficient to charge the offence in the words of the statute. There is not that technical nicety required as to form which seems to have been adopted and sanctioned by long practice in cases of felony, and with respect to some crime, where particular words must be used, and no other words, however synonymous they may seem, can be substituted. But in all cases the offence must be set forth with clearness, and all necessary certainty to apprise the accused of the crime with which he stands charged.'
>
> In the United States vs. Simmons, 96 U. S. 360, 362, this court, speaking by Mr. Justice

Harlan, held, that 'when the offence is plainly statutory, it is, 'as a general rule, sufficient in the indictment to charge the defendant with acts coming within the statutory description in the substantial words of the statute, without any further expansion of the matter.' But to this rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised in the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defence and plead the judgment as a bar to any subsequent prosecution for the same offence.'

So, in United States vs. Carll, 105 id. 611, 612, it was said by Mr. Justice Gray, speaking for the court, that 'in an indictment upon a statute it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; and the fact that the statute in question, read in the light of the common law and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.'

In United States vs. Pond, 2 Curt. C. C. 265, the rule was thus stated by Mr. Justice Curtis: 'It must be remembered that this is an indictment for a misdemeanor created by the statute, and that in general it is sufficient to describe such an offence in the words of the statute, unless they embrace cases which it was not the intention of the legislature to include within the law. If they do, the indictment should show that this is not one of the cases thus excluded.' "

3-b. (Defendant's brief, p. 33).

It is next claimed that the indictment charging a felony the description of the property is ambiguous and uncertain, because the indictment should show specifically how much money, how much funds and how much credit, have been abstracted by the defendant.

Again, we call the attention of the Court to the Northway indictment, appendix A.

The authorities also held such a requirement as unnecessary, and the following quotations will suffice to show the attitude of the courts to such objections as these:

Breese vs. United States (C. C. A. 4th, 1901), 106 Fed. 680, 688:

"Is it necessary to state how much of the embezzlement was of moneys, how much of funds, and how much of credits? Inasmuch as the accused was president of the bank, in

charge, or, at least, placed in supervision, of its assets, and as the charges against him are of transactions in small amounts, occurring on several days, such particularity is evidently impossible. Were this demand enforced, the government would be entrapped into making allegations which it would be impossible to prove. Evans vs. U. S. 153, U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830. The use of these words, notwithstanding their generality, was sustained in U. S. vs. Voorhees (C. C.) 9 Fed. 143. They were used in many cases before the supreme court, and no objection was taken. Evans vs. U. S. supra; U. S. vs. Northway, 120 U. S. 230, 7 Sup. Ct. 580, 30 L. Ed. 664; Batchelor vs. U. S., 156 U. S. 429, 15 Sup. Ct. 446, 39 L. Ed. 478; Coffin vs. U. S., 156 U. S. 433, 15 Sup. Ct. 394, 39 L. Ed. 481."

See also:

United States vs. Voorhees (C. C. N. J., 1881) 9 Fed. 143

and even if the description is not specific as to the amount of moneys, funds and credits, it is cured by the allegation that "a more particular description of which is to the grand jury unknown."

This allegation cures the indictment of any of the defects which are claimed to exist therein by reason of the authorities cited in support of his contention by the defendant, and which have been im-

pliedly overruled by the later attitude of the Supreme Court of the United States upon this point. The following authority announced the attitude of the courts with regard to this allegation:

Jewett vs. U. S., (C. C. A. 1st, 1900), 100 Fed. 832.

"The objection to count 84 is want of certainty, in that there is no distinct allegation of any unlawful act, because the grand jury reports that it was ignorant how Jewett misapplied the funds described. It is well settled, not only as a general rule of the common law, but in the supreme court, that the grand jury is entitled to set out in its indictment that certain facts, ordinarily necessary to be alleged, are to it unknown. This rule was applied to the description of persons whom there was an intent to defraud, under the section on which this indictment was framed, in U. S. vs. Britton, 107 U. S. 655, 665, 2 Sup. Ct. 512, 27 L. Ed. 520. The same result was reached in Coffin vs. U. S., 156, U. S. 432, 451, 15 Sup. Ct. 394, 39 L. Ed. 481, with the additional statement that, where nothing appears to the contrary the verity of the averment of want of knowledge in the grand jury is presumed. In Frisbie vs. U. S., 157 U. S. 160, 167, 15 Sup. Ct. 586, 39 L. Ed. 657, the rule was applied to the description of the excess amount received by an agent engaged in prosecuting a claim for a pension over

that permitted by statute. In Durland vs. U. S., 161 U. S. 306, 314, 16 Sup. Ct. 508, 40 L. Ed. 709, it was applied with reference to the names of persons defrauded, or intended to be defrauded, contrary to section 5480 of the Revised Statutes. There is, therefore, ground for maintaining, if necessary to do so, that the well-known practice of the common law and the decisions of the supreme Court go far enough to cover the particular allegation objected to by the accused; but it is not necessary to determine this proposition."

And there was no evidence to the effect that the grand jury knew any more particular description of the moneys, funds or credits that had been withdrawn.

Furthermore, if the defendant were in any doubt as to what class of property he had abstracted, as charged in the indictment, his remedy was to require a bill of particulars to be complied with to the best of the government's ability.

United States vs. Voorhees, (C. C. N. J. 1881) 9 Fed. 143.

3-c. (Defendant's brief, p. 38).

The defendant claims that if the indictment charges a felony it is defective because the acts constiuting the fraud or from which an intent to defraud may be inferred are not stated.

It is a well known rule of pleading that ultimate facts, not evidentiary matter, is all that is required to be set out in an indictment and is fully satisfied by the pleading (Sec. 3-f). The "means" of the abstraction is immaterial.

The allegations of fraud, as well as the allegations of intent to defraud, are clearly set out in the indictment. Any presumption of innocence attending the statement that the abstraction was "by means of a memorandum check," is overcome by the allegations in the indictment that the defendant "wilfully, and unlawfully abstracted and converted to his * * * own use, benefit and advantage * * * with the intent to defraud the said National Banking Association and said depositor and creditor therein." Such allegations are not consistent with innocence. The indictment upon this point can be sustained on either one of two theories:

1. The statement "by means of a memorandum check" states the means by which the abstraction was made, and the means being immaterial, as we shall point out, that statement is surplusage and can be ignored; or

2. In the case of Evans vs. U. S., 153 U. S. 584, 593, 594, the court, in referring to certain counts alleging wilful misapplication of funds by means of the discount of promissory notes, said:

> "Defendants' entire criticism upon these counts seems to be founded upon the hypothesis

that no weight whatever is to be given the words 'knowingly, wilfully, unlawfully and fraudulently,' or to the general allegation of an intent to defraud—in short, that these words are mere surplusage. Where, however, the statute uses words which are not absolutely inconsistent with an honest purpose, such as was held by this court in Britton's case were the words 'wilfully misapplied,' the allegation of an intent to defraud becomes material in the highest degree."

Again, in the case of the United States vs. Heinze, 218 U. S. 532, 543, the supreme court referred to the decision in the Evans case with approval, in part, as follows:

"It was said that weight must be given to the words 'knowingly, wilfully, unlawfully and feloniously,' " and,

"To the general allegations of an attempt to defraud."

It is therefore submitted that this indictment should be sustained in either view of the law.

As a further authority against the contention of defendant's counsel in this case, the language of this indictment follows the wording of the statute itself.

3-d. (Defendant's brief, p. 41).

Error is again alleged on the supposition that the indictment states a felony, and that it is

defective because it does not charge that there has been a violation of a right of either the bank or depositor.

An answer to this allegation, like most other answers to these claims, simply requires a reading of the indictment.

This indictment alleges, "the defendant wilfully and unlawfully abstracted and converted to his own use moneys, funds and credits of said National Banking Association" held by it for the use of the depositors, and that further, without the knowledge and consent of the association, these moneys were withdrawn. That language certainly charges a violation of the right of the bank.

3-e. (Defendant's brief, p. 42).

Predicated again upon the false premise that the indictment charges a felony, it is claimed that the indictment is defective because it charges in the language of the statute that the defendant unlawfully abstracted and converted certain property, which allegation is too indefinite and uncertain to inform the defendant of the specific criminal acts with which he was charged. In section 3-ii we cited several of the authorities to the effect that the charge in the language of the statute was sufficient for this character of crime.

The means of the abstraction, as we point out in the following section, is not material, and the emphasis laid on the abstraction "by means of the

memorandum check" by defendant's counsel, is likewise immaterial.

3-f. (Defendant's brief, p. 43).

Error is alleged in the charge of the indictment that the money was abstracted "by means of a certain instrument designated as a "memorandum check," which charge is unintelligible, uncertain and repugnant to other charges of the indictment, because there is not issued with the charge by means of an instrument designated as a "memorandum check," any suggestion of unlawfulness, or that the allegation concerning the memorandum check did not show the names of the parties who drew it, or in whose favor it was drawn, or that it was drawn on the National Banking Association mentioned in the indictment or was signed by the depositor or defendant, or whether with or without authority, or that it was not as valuable as the money withdrawn by means of it, or that it would not be paid if presented to the bank for payment, or that false credit was secured by the defendant with the bank by its means.

A study of section 5209 Revised Statutes, and the case of United States vs. Northway, 120 U. S. 334, discloses that the following allegations should appear in an indictment charging abstraction:

1. Averment of time and place;

2. That defendant was an officer, clerk, or agent of a national banking association;

3. That the bank (naming it from its organization certificate) was a national banking association, theretofore duly organized and established, and then and there existing and doing business at a place named, under the laws of the United States;

4. That the defendant being then and there such officer, abstracted the moneys, funds and credits of the association, describing them as best possible;

5. Without the knowledge or consent of the association;

6. With the intent to injure and defraud said association, or some other company or person.

It therefore appears that the means of abstraction is a non-essential element in charging the crime defined by section 5209.

Being non-essential an allegation of means must be surplusage.

And if surplusage, it cannot injure the defendant because no presumption of innocence attaches thereto by reason of the other allegations of the indictment.

And if surplusage and without prejudice to the defendant, the Court's attention is called to section 1025 Revised Statutes of the United States:

> "No indictment found and presented by a grand jury in any district or circuit, or other court, of the United States, shall be deemed insufficient, nor shall the trial, judgment or other

proceeding thereon be affected by reason of any defect or imperfection in matter or form only, which shall not tend to prejudice the defendant."

2. The means of abstraction is immaterial:

U. S. vs. Harper (C. C., S. D. Ohio, 1887) 33 Fed. 471, 480.

"No previous lawful possession, as in the crime of embezzlement, is necessary in order to the commission of this offense; nor is it material by what means, contrivances, or devices the abstraction of its funds from the possession of the bank is effected and accomplished. It may be done by one act or a succession of acts, or it may be effected by fraudulent schemes and contrivances, under the color of loans, discounts, checks, or entries. The methods of its accomplishment do not change the character of of the act. If the ultimate result is to wrongfully obtain funds or moneys of the bank, without its knowledge or consent, and convert the same to the wrong-doer's use and benefit, the instrumentalities resorted to or employed to effect that end in no way change the criminal character of the act."

and again:

United States vs. Breese, (Dist. Ct. N. C., 1904) 131 Fed. 915, 921.

"Abstraction, under section 5209, Rev. St.

(U. S. Comp. St., 1901, p. 3497), is the act of one who, being an officer of a national banking association, wrongfully takes or withdraws from it any of its moneys, funds, or credits, with intent to injure or defraud it, or some other person or company, and, without its knowledge and consent, or that of its board of directors, converts them to the use of himself, or of some person or company other than the bank. No previous lawful possession is necessary to constitute the crime, nor does it matter in what manner it is accomplished. It may be done by one act, or by a succession of acts. It may be done under color of loans, discounts, checks, and the like. The means used do not change the nature of the act. If the necessary or natural result is to wrongfully withdraw funds or moneys of the bank, without its actual knowledge and consent, by its board of directors, and to convert the same to the use and benefit of the abstractor, or to that of some person or company other than the bank, the means resorted to are of no consequence, and in no way affect its criminal nature."

Finally, it may be stated with respect to these six alleged omissions in the indictment that there is no merit in the contention that these averments should be made because in the language of the court in the case of United States vs. Britton, 107 U. S.

662, "neither of these averments is required by the statute."

4. (Defendant's brief, p. 45).

Defendant contends that the grand jury intended to charge the defendant with a misdemeanor and not a felony, and on this point there is no dispute, and it is submitted that they have successfully done so.

5. (Defendant's brief, p. 46).

Error is claimed in the indictment because it does not state that the abstraction was made "without the knowledge and consent of the board of directors of the First National Bank of Roseburg."

There will be no contention between the parties to this case that an allegation of that nature is an essential one to the indictment, but if counsel for the defendant contends that the allegation can be made only in the words which he has quoted, there is considerable contention.

The indictment, in following the example made in the Northway case, averred that the defendant was president of a certain national banking association, to-wit, "The First National Bank of Roseburg, Oregon, theretofore duly organized and established and then and there existing and doing business at the city of Roseburg, in the county of Douglas, within the state and district aforesaid, under the laws of the United States," and further averred that the defendant wilfully and unlawfully abstracted and

converted the money described "without the knowledge and consent of said national banking association," referring, of course, by the word "said" to "The First National Bank of Roseburg, Oregon," which allegation, in turn, can mean the consent of no other body than the directorate by and through which the national banking association acted.

6 (Defendant's brief, p. 49).

The indictment is claimed insufficient because of a lack of allegations that the (a) First National Bank of Roseburg was a national banking association organized under the laws of the United States; (b) that the bank was doing business at the city of Roseburg, Oregon, at the time of the offense charged; and, (c) that the bank was situated in the district over which the court had jurisdiction;

A reading of the indictment will disclose that these matters are all therein alleged, and that they are not alleged by way of recital as claimed by defendant, but as averments of fact in an approved form.

7. (Defendant's brief, p. 55).

It is next claimed that the charge that the money was abstracted and converted to his "the said Thomas R. Sheridan's own use, benefit and advantage, and to the use, benefit and advantage of one B. C. Agee," is ambiguous, uncertain and unintelligible because it does not allege which part, if any, was received by either or both of these parties.

If the money of a bank was unlawfully abstracted by the defendant without the authority of the bank, and with intent to defraud the bank and its depositors, the crime alleged has been committed. The question whether he personally used it or any portion of the money abstracted does not affect the crime.

As disclosed by a discussion of the elements of this offense heretofore mentioned on page 28 of this brief, the final disposition of the money is not a part of the offense. This principle is contained in the following quotation of the court:

Bresse vs. United States (C. C. A. 4th, 1901), 106 Fed. 680, 688:

"An effort was made to show that some of the money which the indictment charged was embezzled, abstracted, and misapplied by W. E. Breese was drawn out for his children. It is difficult to see how this could determine the character of the transaction. If it be true that the defendant took the funds of the bank illegally, how can it affect the transaction whether he took it for his own pleasures, or to pay some debt to a third person, or to restore to his children money belonging to them, which he had used? The purpose of the statute is to preserve the moneys, funds, and credits of the bank for legitimate bank purposes, and to meet obligations incurred in its business. It therefore makes it a criminal offense to misapply and

> convert the funds of these banks, without regard to the fact that the person so misapplying them received from the misapplied funds any benefit or advantage for himself, or intended these for others. U. S. vs. Lee (C. C.) 12 Fed. 819."

And, as the trial judge in this case very tersely remarked, "what difference does it make what he did with the money?" (Tr. p. 68).

8. (Defendant's brief, p. 55).

It is assigned as error in that two distinct offenses are charged, that the indictment states the defendant "wilfully and unlawfully abstracted and converted and **caused to be abstracted and converted"** the money described. It is claimed that in addition to alleging abstraction, a second offense of wilful misapplication is charged.

The terms "abstract" and "misapply" are both used in section 5209 Revised Statutes, as describing two entirely different crimes. The word "abstract," unlike the word "misapply" as used in said section, is not ambiguous because it does not appear from other sections of the national banking act that there are two or more kinds of abstracting, both unlawful, but only the one described and punishable as a criminal offense. The word "abstract" as used in the statute, therefore, has but one meaning, being that which is attached to it in its ordinary and popular use. It is to be accepted with that meaning when

framed in an indictment under this section.

United States vs. Northway, 120 U. S. 334, 335.

Furthermore, it is equally the act of the defendant in his abstraction whether he personally abstracts the money or personally causes the money to be abstracted for his use and benefit, the expression, "abstracted and caused to be abstracted," or "he mailed or caused to be mailed," or "placed or caused to be placed," have been repeatedly used and sanctioned in all courts as proper pleading. The citation of authority to such a use and established method of pleading is unnecessary.

9. (Defendant's brief, p. 56).

It is claimed as error that the indictment charges intent "to injure and defraud said national banking association, and said depositor and creditor therein," because there could not have been, under any construction, an intent to defraud both bank and depositor.

The statute states the act, when accompanied by other elements, is criminal when done "with intent * * * to injure or defraud the association or * * * any individual person." The money being the property of the bank (1, supra) a taking of it without the bank's consent accompanied by the other elements of the crime certainly disclose facts from which the jury could find an attempt to defraud the banking association, and a similar finding

could be made by the jury when the taking, coupled with the other elements of the crime, was made without the authority of the depositor.

10. (Defendant's brief, p. 57).

It is claimed that there is error in the first and fourth counts of the indictment for the property therein described as abstracted was the property of the depositors because the indictment does not then allege that the property was abstracted "without the knowledge and consent of said depositors."

This is another straw man built up by defendant's counsel to be summarily dealt with. The property is not the property of the depositors and so far as the knowledge and consent of the depositors was concerned the same was not made an element of the crime charged in this case, but could be used only as a justification for the acts charged to be crimes. And let it be understood at this point as applying throughout this brief that the crime in this case was the taking of this money without the knowledge and consent of the First National Bank of Roseburg, and that all testimony and claims made with regard to the lack of consent of the depositors merely deals with the defense that the defendant endeavored to establish in this case, that the taking by the defendant of the money of these depositors was as their agent, a defense which he was not able to establish.

11. (Defendant's brief, p. 57).

Error is claimed in that the indictment does not describe any property of a nature that it could be unlawfully abstracted within the meaning of the criminal section in connection.

Ignoring the proposition that the property abstracted might be the depositors and answering the proposition that the money, being the property of the bank, it was then only a chose in action and could not be abstracted. It is certain that the statute in its broad language of "money, funds and credits" covers every kind of property which could be placed by a depositor in a bank.

This alleged error is approaching the same question from another point which we have previously dealt with under section 3-b.

12. (Defendant's brief, p. 58).

Error is alleged in the charges of the indictment in that the money obtained by the defendant was not by abstraction, but under false pretenses, which is not an offense against the United States.

The word "abstract" as used in section 5209 is not a word of settled technical meaning like the word "embezzle," as used in the statute defining the offense of embezzlement, and the words "take, steal and carry away," as used to define the offense of larceny at common law. It is a word, however, of simple popular meaning. It means to take, withdraw from, so that to abstract from the funds of a

bank, or a portion of them, is to take and withdraw from the possession and control of the bank all moneys and funds alleged to be so abstracted. To constitute that offense, within the meaning of the act, it is necessary that the moneys and funds should be abstracted from the bank, (a) without its knowledge and consent, and (b) with the intent to injure and defraud it or some other person.

These elements are here alleged and, it is submitted, proved, thereby fulfilling all requirements in this particular of the statute.

Further than this, the argument relating to the lack of criminal allegations concerning the taking of this money by means of a memorandum check, has been dealt with in a previous section (3-c, supra), of which alleged error this is but another angle of approach.

13. (Defendant's brief, p. 58).

Only the ingenuity of astute counsel could have conceived of the alleged error in the indictment in not charging an injury to the bank because the indictment does not in addition to charging an injury by the abstraction of certain funds also charge that the memorandum check was not as valuable as the money alleged to have been abstracted by means of it.

As disclosed by the testimony of the defendant (Tr., p. 213), these memorandum checks were given to the bookkeeper, passed through the regular form

by him, written up and the sums thereon charged to the party's account from which the money was drawn. The memorandum checks are before the court in this case, and it can be observed they are not promises to pay the obligation, but administrative means used within the bank for the means of charging one account with money withdrawn or the transferance of money from one account to another.

Defendant's counsel builds up a theory that the memorandum check was a negotiable instrument but it does not contain any of the element of negotiability. (L. O. L., Sec. 5834.)

As before stated, the indictment charges the elements of this offense, and further ~~requirements~~ allegations are unnecessary.

United States vs. Britton, (supra).

DIVISION II.

Instructions to the Jury Requested by the Defendant.

The objections stated from page 59 to 71 of the defendant's brief relating to a requested instruction which it is claimed the evidence supported, and the alleged authority of the defendant with regard to the bank deposits, is ambulatory in its nature, but it seems to be comprised of three elements which will be taken up separately and discussed.

Defendant's counsel excepted to the refusal of the court to a requested charge that the president

of a national bank who has full charge of making loans on behalf of the bank, has a right to lend any portion, or all, of the money deposited in the bank by depositors on general checking accounts without first obtaining permission from the depositor or depositors so to do. This requested instruction was properly refused, for, as we shall hereinafter

This requested instruction was properly refused, because this is not a case where the defendant loaned the funds of the bank for the bank. What he did was to take the money from the account of the depositor, convert it to his own use and employed the agency of a note in favor of the depositor as a mere subterfuge.

It was claimed by the defense, as we shall also hereinafter indicate, that his authority to make these loans, if any, arose from an authorization given by the depositors. Therefore, instructions relating to authority of a president to make these loans and given by the bank were immaterial.

The second element of this general objection is that the relation of debtor and creditor having been established, the bank could not hold any money for the sole use and benefit of any of its depositors. This is inconsistent with the claim of the defense made in Division I, Section I.

The conclusion drawn to the effect that the bank is the debtor and the depositor is the creditor, and that the bank owns absolutely the funds placed therein by a depositor on a general checking ac-

count, is correct as indicated by the authorities cited by the defendant. The claim, however, that the bank cannot hold money for the sole use and benefit of a depositor is not correct, and the error that counsel makes in claiming that no crime was either stated in the indictment or disclosed by the evidence with respect to the money being held "for the sole use and benefit" of any depositor, is that he assumes that "for the sole use and benefit" refers to a special deposit and not a general deposit creating the relation of debtor and creditor between the bank and its patron.

The allegation "for the sole use and benefit" of a particular depositor does not, of course, mean, and it requires some addition to secure the construction, that this was a particular deposit in which the identical money placed in the bank by its patron was to be returned.

Not only does it require some addition to secure that construction placed upon the allegation by defendant, but the authorities we have cited state there is a presumption against such an addition.

> Bank of Blackwell vs. Dean (1900), 9 Okla. 626.

The indictment should be read as a whole, and in this particular there is contained in each count an allegation that the money, funds and credits abstracted were those "of said national banking association, of the value of" a certain sum. This allega-

tion also negatives the strained construction counsel places upon the phrase, "for the sole use and benefit," and shows that the relation here was that of debtor and creditor rather than as counsel would contend that relation "peculiar to banking business" of bailor and bailee.

The phrase, "for the sole use and benefit" of a depositor, means, as expressed by Michie in his works on "Banks and Banking," volume 2, page 887, that "where a party confides a sum of money to another, he must return to him, on demand, the like sum and not the identical money, the transaction is a simple deposit." Further argument hereon is unnecessary.

This brings us to the third element of alleged error in this general objection from page 59 to 71 of defendant's brief, and that relates to the authority with which the defendant claims himself invested for the purpose of taking this money, and is raised by the claim of defendant that the facts shown by the evidence establish (p. 67) that a national bank through its board of directors appointed its president as its managing agent and trusted him with the possession of the money of the bank for the purpose of lending it.

It may be remarked in passing that the facts claimed to be established in the two groups of facts mentioned in the defendant's brief on page 66 and 67 are not established by the evidence in this case.

Relating to the defendant's authority to take this money, it is shown by the evidence and admitted by the defendant in his own testimony, (Tr., pp. 212, 213, 214, 215, 216, 217, 219, 220), that the money of these depositors was **taken from the bank** by himself.

There are only two sources of authority which could vest the defendant with the right to abstract this money:

1. The bank, by its board of directors, might might give authority to make property loans out of the reserve fund of the bank;

2. The depositor might authorize the defendant to make a loan for him, the depositor, out of his individual account.

Taking them up in order we observe as follows:

1. It is conclusively shown that no authority was derived by the defendant from the bank or its board of directors, for two reasons:

(a) The directors could not authorize a loan out of the depositors individual accounts any more than they could go into his pockets and take his money. Their authority is limited to legal transactions.

> Breese vs. U. S., (C. C. A. 4th, 1901), 106 Fed. 680:
>
> "Apart from this, the language of the requests is broad enough to mean that, however fraudulent and illegal the acts of the defendant

were, if they were permitted, sanctioned, or ratified by the other officers of the bank, they were not unlawful. A startling proposition. The most formal vote of the board of directors could not authorize the embezzlement, abstraction, or willful misapplication of the funds of the bank. Minor vs. Bank, 1 Pet. 44, 7 L. Ed. 47. The authority of the officers of the bank and of its board of directors extends only to legitimate transactions honestly intended for the benefit of the bank. U. S. vs. Harper (C. C.) 33 Fed. 484."

(b) It is admitted that the minute book (Government's Exhibit No. 5) of the First National Bank contains nothing about the directors authorizing Thomas R. Sheridan to loan money out of the depositors' accounts by means of the memorandum checks or otherwise.

After witness S. A. Sanford had identified Government's Exhibit No. 5, and stated it contained a list of the meetings and business transactions of the board of directors of the First National Bank of Roseburg, the following questions were asked by Mr. Reames to answers and statements of counsel made as follows:

Q. Was the matter of the drawing of these memorandum checks on the accounts—

Mr. Fulton: If that is your purpose in that examination I will say that we do not contend

that any of these matters were taken up with the board of directors.

Court: I don't think it is necessary anyhow under the statute.

Mr. Fulton: I don't think so either.

Court: But it is conceded they were not.

Mr. Reames: It is stipulated it is not necessary?

Mr. Fulton: No, the court says it is not necessary, I don't stipulate. I don't say what my position is in the matter, I mean what the law is, but we do concede there is nothing in the minutes about it.

Q. Did the bank so far as you know ever give its consent to the drawing of those memorandum checks by Mr. Sheridan?

A. No, sir.

Q. And if it had given—

Mr. Fulton: Now, that is objected to, the question is, what has the bank.

Court: The board of directors are the managing officers of the bank.

Mr. Fulton: I don't think they have a right to ask that question in that way. If it is material that is not the way to prove it. The board of directors, as Your Honor says, is the bank so far as exercising the powers and functions of the corporation are concerned. That is all there is of it.

Mr. Reames: I would like to ask two questions, if the court please.

Q. Then did the board of directors at any time while you were cashier of the bank ever authorize those transactions?

Mr. Fulton: What the board of directors did is proven by the minutes. The minutes we concede have nothing. I can't see why counsel insists on this, but what the board of directors did is proven by their records and they didn't do anything.

Court: I think the records are prima facie evidence of what they did and if they contain no evidence of what they did and if they contain no evidence of it the presumption will be that they did not.

Mr. Fulton: Of course, we contend—our position is that so far as the board of directors are conecrned they could not have given the authority to make a loan for these parties, the parties alone would give that authority. We are claiming our authority anyway from these parties."

Under the statute charging this crime and under the allegations of the indictment declaring the same and under the authorities defining the crime of abstraction it was incumbent upon the government to prove that the taking of this money from the individual accounts of the depositors was without the

knowledge and consent of the directors of the First National Bank of Roseburg.

The minute book, (Government's Exhibit No. 5) is in evidence. It is the only means of disclosing whether or not the directors of the First National Bank of Roseburg authorized the defendant to make any loans. It is silent thereof. It is admittedly silent. The government has so proved this element of its case.

Authorities further discussing this principle we have just announced are as follows:

The case of the United States vs. Northway, 120 U. S. 327, holds that to constitute abstraction within the meaning of the act, it is necessary that the ~~evidence~~ property should be abstracted from the bank without its knowledge and consent. Cases holding a similar principle are,

United States vs. Harper, 33 Fed. 471, 479;
United States vs. Martindale, 146 Fed. 283;
United States vs. McKnight, 115 Fed. 115.

But it may be said at this point that the consent of the association cannot be given by any officer in bad faith, and that the authority of every officer is limited to transactions carried out in the honest exercise of discretion, and in the belief that they will accrue to the benefit of the bank.

United States vs. Breese, 131 Fed. 926, wherein the court said:

"If such loans, or discounts, or overdrafts,

are made or permitted in bad faith for the purpose of personal gain, or for the private advantage of the officers, and not, therefore, in the honest exercise of official discretion, they do not give the consent of the bank, and the defendant would not be predicated by said authority so given, if he was a party to such transaction. * * * The authority of the directors and the officers and committees of the bank extends only to legitimate transactions intended for the benefit of the bank."

Breese vs. U. S., 106 Fed. 684, 685;
U. S. vs. Tainter, 11 Blatch. 374;
Minor vs. Bank, 1 Pet. 46, 71;
U. S. vs. Eno, 56 Fed. 218.

In Minor vs. Bank, 1 Pet. 46, 71, Mr. Justice Story said:

"However broad and general the powers of the directors may be, for the government and management of the concerns of the bank, by the general language of the charter and by-laws, those powers are not limited, but must receive a rational exposition. It cannot be pretended, that the board could, by a vote authorize the cashier to plunder the funds of the bank, or to cheat the stockholders of their interest therein. No vote could authorize the directors to divide among themselves the capital stock, or justify the officers of the bank in an avowed embezzlement of its funds. The

cases put are strong, but they demonstrate the principle only in a more forcible manner. Every act of fraud, every known departure from duty, by the board, in connivance with the cashier, for the plain purpose of sacrificing the interests of the stockholders, though less reprehensible in morals, or less pernicious in its effects, than the cases supposed, would still be an excess of power, from its illegality, and, as such, void, as an authority to protect the cashier, in his wrongful compliance. Now, the very form of these pleas, sets up the wrong and connivance of the board as a justification; and such wrong and connivance cannot, for a moment, be admitted as an excuse for the misapplication of the funds of the bank, by the cashier."

Nor was it ever contended by counsel for defendant at the trial of this cause that there was any authority from the directors of the bank for the abstractions made by this defendant. Mr. Fulton, the defendant's counsel, at the trial stated:

"Now, it all depends on what the agreement between the parties was, whether or not Mr. Sheridan had a right to take that money and use it for himself or loan it to others; all upon the agreement."

"It is not proved that he had the authority, it is not proved that he didn't have the authority, or the fact that he used the money. Whether

he did depends upon what the parties said. Now, he says the authority only went to the $500, we say the authority went to the whole, but that is a matter of dispute between the parties, of course. The fact that he used it for another transaction, got $800, does not tend to prove one thing or another, because it all rests upon what the agreement between the parties was, and that does not tend to prove or disprove the agreement between the parties; at least I can't see that it does. If our statement is correct he had a right to it; if his statement is correct it was limited to a certain one, and it all goes back to what the real agreement was between the parties, and his using it for this other only tends to complicate the situation, and I think the testimony ought to be confined to the charge in the indictment, as to whether or not that was in excess of his authority." (Tr., pp. 54, 54.)

The question of legal authority of the defendant Sheridan as given by the bank was never claimed, nor the question was never raised in the trial court, and an assignment of error cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon so as to give the court of appeals jurisdiction.

Ansbro vs. U. S., (1895), 159 U. S. 695, 698.

With this showing upon the part of the government in satisfying the elements of the crime as named in the statute, it devolved upon the defendant to show authority and this authority he claimed was secured from the depositors.

2. The question of authority of defendant Sheridan to withdraw the individual deposits of patrons of the First National Bank of Roseburg, as given by the depositors, may be disposed of with brevity.

This was the admitted issue on the element of authority. The issue was one of fact. The government offered its testimony of lack of authority, and the defendant offered his testimony of the grant of authority. The jury decided on this question of fact by their verdict that there was no authority. The finding being one of fact, with evidence to support it, it is binding upon the Circuit Court of Appeals.

II. (Defendant's brief, p. 71).

It is claimed that the evidence demonstrates that no money was ever abstracted by means of a certain memorandum check.

As hereinbefore stated, the means of abstraction is immaterial.

III. (Defendant's brief, p. 72).

Objection is here made that the evidence does not show that any money, funds, or credits have been abstracted or converted from the bank by the defendant.

Discussing the two points upon which conviction was made:

Count one is with respect to David Hull, and the evidence showed that his account was debited March 7, 1911, with the sum of $230, and B. C. Agee's account was credited $230. (Tr., p. 66.)

The memorandum check (Government's Exhibit No. 4) showed how it was drawn out of David Hull's account, and the deposit slip (Government's Exhibit No. 7), showed how the $230.00 was credited to B. C. Agee's account (Tr., p. 64, 65). The promissory note dated March 4, 1911, for $230.00 in favor of David Hull, and signed B. C. Agee, by T. R. S., (Government Exhibit No. 6), was admittedly in the handwriting and signed by the defendant, and since Thomas R. Sheridan and B. C. Agee were in partnership (Tr., p. 102), and the defendant repeatedly admitted taking these moneys, and with respect to David Hull's money, the defendant testified that

> "Mr. Hull came to the bank and asked me if I could not get some interest for him from his money; he said he didn't want it to lie idle; I told him 'Yes'; I told him I could use it, and he said all right. * * * I loaned it from time to time and as the loans were paid for I would give him credit in the books and then loan it out again." (Tr., p. 212.)

It was probably apparent to the court below

that the money, funds and credits of the First National Bank of Roseburg were abstracted.

With respect to Count Four, relating to depositor Laura M. Verrell, the evidence showed that on April 15, 1911, her account was debited $5,000, and that that sum was "loaned by T. R. S.," as stated on the ledger, and that said sum was transferred to the account of Thomas R. Sheridan on the books of the bank (Tr., p. 88), and memorandum check dated April 15, 1911, for $5,000 against the account of Laura M. Verrell, was signed by the defendant in his own handwriting (Government's Exhibit No. 9), (Tr., p. 73), and shows how the money was abstracted from the Verrell account. A promissory note dated April 15, 1911, for $5,000, due one year after date, in favor of Laura M. Verrell, was admittedly in the handwriting and signed by the defendant, (Government's Exhibit No. 10), (Tr. p. 74), upon which no credits have been paid.

This, together with the defendant's admissions of the taking (Tr., 215, 216):

> "I asked her if she wanted to lend that money out, and she said she did; she said she did not know exactly who to trust, and I asked her if she would trust me, which she said she would. Well, I told her as soon as I was able to place it I would advise her and charge her account and put the document in the usual place, which I did." (Tr., p. 215.)

> "She said that all she wanted to know was that she was going to get it some time; and I told her that if I lived I would surely pay her; and she said that she was glad to hear me say so, and after a few other casual remarks we parted." (Tr., p. 216.)

probably convinced the trial court and jury that the money was abstracted and converted from the bank.

Regarding the general testimony that the moneys, funds and credits of the bank in the accounts of other depositors have been taken from the bank, we call the court's attention to the following statement of the defendant himself:

> "This (meaning the conversation regarding the desire of the depositor for interest) was before I took the money, and all these transactions were before I took the money." (Tr., p. 213.)

Speaking of whether or not the money was taken from the bank in the account of W. J. Carlon, the defendant said:

> "So I took it." (Tr., p. 213, also 214.)

With regard to the taking of the money from the bank in the account of J. E. Haney, defendant testified:

> "Mr. Haney asked me if I could not get some interest for him, that there was too much money there; I told him I could and he told me that I could take it and use it in any way I wanted to, but he wanted my endorsement, and

pursuant to that I took the money." (Tr., p. 216.)

With regard to the taking of the money from the account of C. E. Marks, was testified to by the defendant, as follows:

> "Mr. Marks told me he could not afford to leave his money lying idle, he wanted me to handle his money, which I did." (Tr., p. 217.)

And the following statement was made by the defendant with regard to taking the money from the bank in the account of W. E. Chapman:

> "Like the rest, he came in and said he wanted some interest on his money and he told me to loan it, which I did." (Tr., p. 219.)

And from the bank and the account of Joseph Mosthaf:

> "He had a water and light bond and after that was paid he told me that he wanted to put the money out again, and told me to take it and dispose of it as I saw proper; that is to keep it, and I did as he authorized me to, and put in a memorandum check and a note in the vault just the same." (Tr., p. 220.)

And from the bank in account of Wm. Wende:

> "I used his $1010 at his request; he requested me to use it and I did." (Tr., p. 220.)

And other abstractions were indicated by implication from the testimony.

The defendant's own admissions are surely suf-

ficient to show that the money was taken from the bank even arguendo if the government's theory of the application of evidence of a depositor to another account was not sufficient abstraction.

III-b. (Defendant's brief, p. 79).

The objection here raised is answered in the preceding section.

III-c. (Defendant's brief, p. 80).

The objection is next made that there was no "conversion," and the authorities are correctly cited to the test of conversion.

But on page 80 of plaintiff's brief, citing U. S. vs. Morse, 161 Fed. 429, it is quite apparent that the bank could have maintained an action against Thomas R. Sheridan, because he had abstracted and caused to be abstracted, money from the accounts of the depositors without the consent of the board of directors of the bank, and the defendant admits having used these moneys for his own purpose.

IV. (Defendant's brief, p. 83).

The next objection to the evidence is that there were no facts shown from which the intent of the defendant to defraud could be inferred.

INTENT TO INJURE OR DEFRAUD.

The intent to injure or defraud is an essential ingredient of every offense specified in the statute.

U. S. vs. Lee, 12 Fed. 816,

U. S. vs. Harper, 33 Fed. 471.

But this intent may be inferred upon the presumption that every man intends the natural and ordinary consequences of his acts.

> "The law presumes that every man intends the legitimate consequence of his own acts. Wrongful acts knowingly or intentionally committed can neither be justified nor excused on the ground of innocent intent. The color of the act determines the complexion of the intent. The intent to injure or defraud is presumed when the unlawful act which results in loss or injury is proved to have been knowingly committed. It is a well settled rule which the law applies in both civil and criminal cases that the intent is presumed and inferred from the result of the action. Intent to injure is not necessarily an intent to wreck a bank."

Agnew vs. U. S., 165 U. S. 53,

In U. S. vs. Youtsey, 91 Fed. 471, the court (Taft, J.), said:

> "If, therefore, the funds, moneys or credits of the First National Bank of Ocala are shown to have been either embezzled or willfully misapplied by the accused and converted to his own use, whereby as a necessary or legitimate consequence the association's capital was reduced or **placed beyond the control of the directors, or its ability to meet its engagements or obligations or to continue its business** was lessened or destroyed, the intent to injure or de-

fraud the bank may be presumed."

The latter case shows what is meant by "injury." This does not mean the total destruction of the bank. A mere withholding of funds is enough. Thus, in the case of U. S. vs. Kenny, 90 Fed. 264, p. 265, 266, checks were drawn by the defendant and paid by the bank, but withheld from his account for varying periods of time. They were later repaid to the bank by the defendant, and it was held that the bank was deprived of the use and control of its funds during those respective periods. This was held to be a loss and injury to the bank.

It is not necessary that the defendant adopt fraudulent means; the intent of the act controls not the manner of its execution.

> "It is not necessary that a discount be procured by fraudulent means since the offense consists not in the use of fraudulent means but in the discount of a note which both parties knew to be unsecured, with intent thereby to defraud the bank. The argument of the defendant assumes that under no circumstances is the discount of a note, to all parties known to be worthless, an offense under the statute, even though such discount be made for the deliberate purpose of defrauding the bank out of the proceeds of the note so discounted. We do not see how it is possible to give such an interpretation to the statute without a practical nullifica-

tion of its provisions."

Evans vs. U. S., 153 Fed. 590.

The statute may be satisfied with an intent to injure some other company, body politic or corporate, or individual person than the banking association whose property is abstracted.

U. S. vs. Northway, 120 U. S. 327-335.

The presumption of intent may under certain circumstances become conclusive.

> "The act of the defendant renders the association liable to a forfeiture of its charter. Still further it casts upon the bank a risk which attached at the instant of the doing of the act, and this a risk notoriously great and extraordinary in character and outside the bounds of proper commercial use. **It placed the capital of the bank beyond the control of the officers** of the association, and it was an unlawful dealing with the money of the corporation belonging to a class of institutions whose welfare is intimately connected with the public welfare.
> * * *
>
> The act of the defendant, therefore, necessarily involved injury not only to the association, but also in a proper sense to the public. An act having such consequences when knowingly done discloses moral turpitude and cannot be innocent. It may, therefore, well be held that proof of such an act proves **con-**

clusively an intent to injure, because when knowingly done it affords no opportunity for justification or legal excuse and manifests so clearly a general guilty intent as to make it of no consequence what other particular intent coexisted therewith, and to preclude inquiry as to such other intent or into the motives which impelled to its commission. A generous motive is not inconsistent with a guilty intent, and proof of the one does not disprove the other."

U. S. vs. Tainter, 11 Blatch. 374-376.

Personal gain is immaterial.

Breese vs. U. S., 106 Fed. 684.

The use of the words "to injure" as contrasted with the word "defraud" is important.

U. S. vs. Tainter, 11 Blatch. 374-376.

"Where a president of a bank charged as a trustee with the administration of the funds of the bank in his hands converts them to his own use, he embezzles and abstracts them within the statute referred to unless he shows authority for so doing."

Can Campen's case, 2 Ben. 419, p. 425.

The question of intent to defraud being one of fact, the jury, from the evidence disclosed showing that there was no authority from the bank and none from the two depositors in question, probably concluded there was such an intent to defraud as was alleged in the indictment.

(There is no section V in defendant's brief.)

VI. Defendant's brief, p. 89).

It is claimed that the evidence shows embezzlement rather than abstraction. Very little argument is needed to refute this contention. There are two fallacies in the argument given to support defendant's contention. One is based on the assumption that the defendant as "possession" of the moneys claimed to have been abstracted. The possession of the money was apparently in the national banking association of which the defendant was but an officer. Abstraction differs from embezzlement in that "no previous lawful possession as in the crime of embezzlement, is necessary in order to constitute the commission of this offense." Nor is it material by what means, connivance or device the abstraction of the funds from the possession of the bank is effected. The ultimate result is the wrongful obtaining of moneys, and funds of the bank without its knowledge or consent, and to convert the same to the wrongdoer's own use.

U. S. vs. Harper, 33 Fed. 480.

The other fallacy is the assumption by defendant that he was the managing agent of the bank to make loans of the character of these in question. We have previously shown that he had and could have had, no such authority as to loan from the individual accounts of these depositors. (See Section I, Division II, this brief.)

VII. (Defendant's brief, p. 94).

It is further claimed the offense shown by the evidence is maladminstration and not abstraction.

In abstraction there is, of course, a general maladministration, but wilful abstraction of moneys, funds and credits of a banking association is made an offense by section 5209 of the Revised Statutes, and is different from the acts of official maladministration referred to in section 5239, Revised Statutes. In this indictment the elements of abstraction are alleged and, it is submitted, proved.

VIII. (Defendant's brief, p. 100).

It is claimed that the evidence discloses making a false entry and not abstraction.

There is no false entry because it cannot be a false entry to make a recital on the books of the bank which speak the truth.

U. S. vs. Young, 128 Fed. 115.

"False" means wilfully and intentionally false, with intent to deceive.

U. S. vs. Allen, 10 Bliss 90.

Here all the entries made show the money abstracted from the individual depositor's account, and later admittedly abstracted from the bank, and all these entries are true.

It is also clear that the making of a false entry is a concrete offense which is not committed when the transaction entered actually took place and is entered exactly as it occurred.

Coffin vs. U. S., 156 U. S. 463.

Coffin vs. U. S., 162 U. S. 684.

Any entry in the books of a bank which is intentionally made to represent what is not true, does not exist, with intent either to deceive its officers or defraud the association, is a false entry within the meaning of the statute making this a criminal offense. It is apparent that this is not the crime charged nor proved.

IX. (Defendant's brief, p. 101).

It is claimed the evidence disclosed the obtaining of money under false pretenses and not abstraction.

In a sense there is a false pretense on the part of the defendant in claiming that he had authority to take this money when in truth and in fact no such authority existed, but there is no crime against the United Stated in this particular of obtaining money under false prtenses, but there is a crime of abstraction, the elements of which are alleged and proved; and this subject has been previously dealt with under Division I, Section XII.

It must be somewhat embarrassing to the defendant to have his counsel attach so many criminal attributes to the single criminal act alleged by the government.

X. Defendant's brief, p. 101.)

It is claimed that error occurred in the court's

admission of testimony that the account of the person to whom the money was loaned was in overdraft at the time of said loan (Tr. pp. 67-70). The court announced with regard to this proof of the overdraft in the B. C. Agee account, that,

> "Mr. Fulton: I want to make this clear if I can, as my position; he is not to be held liable for any unwise investment of the money or use of the money. If he had a right to take the money, because he didn't wisely invest it or wisely loan it, is immaterial, the question is, did he have authority directly or implied, to take that and use it, either for himself, or loan it?
>
> Court: If that were the only issue in the case I would sustain your objection without hesitation, but such a wide field is thrown open on the other question and it is so hard to limit testimony to its proper sphere. I will permit him to answer the question, but, as I say, it doesn't prove anything, one way or the other." (Tr. p. 70).

Furthermore, to be reversible error, it must be shown where the testimony was prejudicial to the defendant, and no such showing is made.

Again, it is shown that J. E. Haney had $5,500 in the bank, which was evidently taken out in favor of the defendant, after which J. E. Haney drew against his account putting it in overdraft $170.50. (Tr. p. 111, 112).

However, it is the theory of the government that proof of these collateral facts of overdraft were and are admissible on the ground of intent with which the defendant overdrew these accounts.

Breese vs. U. S., (C. C. A. 4th, 1901), 106 Fed. 680, 684.

XI. (Defendant's brief, p. 102.)

It is claimed if the abstractions were made they were made with the knowledge and consent of the National Banking Association because the defendant was the managing agent of said concern.

There is no proof in this case that the directors of the First National Bank of Roseburg ever authorized the defendant to act as its managing agent for the purpose of making loans, and they are the only parties who could give such authority to the defendant.

XII. (Defendant's brief, p. 103.)

The alleged error herein contained relates to a requested instruction, as follows:

> "There is some testimony on the part of the prosecution tending to show that in some instances a depositor authorized the defendant to take his or her money then on deposit in the bank and loan it on good security and that defendant thereupon took the money and used it himself, placing his personal note in the bank for it. The defendant, however, contends that in all such cases the depositor authorized him

to use the money himself, if he desired so to do. I instruct you, however, that so far as this case is concerned, if you find that as to any sum of money mentioned in any count of the indictment the defendant was authorized to take the same but instructed to loan it on security only and that he thereupon took the money and used it himself, you cannot find him guilty for so doing, for in such case he had authority to withdraw the money from the bank and if, after withdrawing it, he did not loan it as directed but used it himself, he did not thereby violate the statute under which he is being prosecuted here." (Tr. p. 270, 271.)

This instruction was in reality given in the trial court and in better phraseology and as a clearer statement of the law, as follows:

"The principal question for your consideration will be—or at least the first question for your consideration will be: Was the defendant authorized by the depositors to withdraw these moneys? If you find from the testimony in this case that he was so authorized or if you find from the course of dealing between the defendant and the depositor that the defendant had reasonable cause to believe and on good faith did believe that he was so authorized, then he is not guilty of the crime here charged. But if you are satisfied beyond a reasonable doubt that he had no authority from the depositor to

withdraw the funds, and if you further find that he had no reasonable cause to believe and did not in good faith believe that he had such authority, then his abstraction of the funds was wrongful, and the crime is complete if you find that the abstraction was made with the intent to injure or defraud either the banking association or the depositor." (Tr. p. 233, 234.)

This was the language of the judge and he was at liberty to prefer his own language to the language of counsel expressing the same idea.

Tucker vs. U. S., 151 U. S. 154.

The charge as a whole having correctly conveyed to the jury the rule which they were to determine from the evidence the question of intent, there was no error to the prejudice of the defendant in refusing the requested instruction.

Coffin vs. U. S. (1896), 162 U. S. 664, 675.

XII-A. (Defendant's brief, p. 103.)

This is an objection to the admission of evidence of similar offenses for the purposes of showing intent.

The principle is so well established that similar offenses may be introduced to show the intent as to hardly need citation of authority.

However, the following case states the opinion and holds that similar transactions both before and after the principal one in issue, are admissible.

Mr. Justice Story said:

"The question was one of fraudulent intent or not, and upon question of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of a party of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. Indeed, in no other way would it be practicable in many cases to establish such intent or motive, for the single act, taken by itself, may not be decisive either way; but, taken in connection with others of a like character and nature, the intent and motive may be demonstrated almost with conclusive certainty. They constitute exceptions to the general rule excluding evidence not directly comprehended within the issue; or, rather, perhaps, it may with some certainty be said the exception is necessarily embodied in the very substance of the rule, for whatever does legally conduce to establish the point in issue is necessarily embraced in it, and therefore the proper subject of proof, whether it be direct or only presumptive."

Wood vs. U. S., 16 Pet. 342.

The above quotation was cited with approval in Breese vs. U. S. (C. C. A. 4th) 106 Fed. 680, 684.

Furthermore, the court concisely and clearly lim-

ited the scope of these similar offenses upon two different instructions to the jury:

1. The court said, upon information from the United States Attorney that the witness now under examination was not one of the witnesses named in the indictment; that,

> "I will instruct the jury now, however, that this has no bearing upon the question whatever as to whether or not he (the defendant) was authorized to take out the money of these other persons, and you must not consider the testimony in that light. You can only consider its bearing upon the question as to whether or not the defendant intended to defraud the banking association or any other person or persons." (Tr. p. 113.)

And in his final instructions to the jury, the court said:

> "This, gentlemen of the jury, is the proper place to limit the scope and effect of certain testimony which the court received during the trial. You will recall that the court admitted testimony relating to transactions between the defendant and other depositors of a similar nature to those set forth in the indictment. This testimony was not offered for the purpose of proving authority or a want of authority for the issuance of the particular checks set forth in the indictment. You cannot prove that a man had authority to draw a check for one depositor by

proving that he had authority to draw a check for another depositor at another and different time. The converse of this is equally true. You cannot prove that a man had no authority to withdraw funds from a bank in behalf of one depositor by proving that at another and different time he withdrew funds from the bank belonging to another depositor without authority. So that the testimony as to these transactions outside of those particular transactions set forth in the indictment must not be considered by you in determining the question of want of authority at all. You will not consider this testimony until after you have settled in your own minds beyond a reasonable doubt that the funds mentioned in the indictment were withdrawn from the bank by the defendant without authority from the depositor, real or apparent, as I have defined these terms to you." (Tr. p. 234, 235.)

And as to the additional argument herein, that the defendant was the authorized agent and empowered to make the loans for the First National Bank of Roseburg, this matter has been previously discussed in Division II, Section 1, and much of the argument herein is based upon the false premise that the bank authorized defendant Sheridan to loan this money from the individual accounts of the depositors.

In support of the principle that similar offenses are not admissible to show intent, defendant's counsel cites the case of State vs. Bokien, 44 Pac. 889, but in this case the court expressly states (Defendant's brief p. 104), that,

> "In this instance, the question of criminal intent, or guilty knowledge, was not in issue,"

while in the case at bar it is announced by the court and admitted by defendant's counsel, that one of the elements which the government must prove in order to secure a conviction was the element of criminal intent (Tr. p. 113, 114).

XIII. (Defendant's brief, p. 112.)

In this section error is alleged in the court's refusal to direct the jury to return a verdict in favor of the defendant because the evidence did not show an intent to defraud. This alleged error is based on assignment of error 25 (Tr. p. 265); the same point was raised in the trial of embezzlement in the case of Breese vs. U. S. (C. C. A. 4th, 1901), 106 Fed. 680, where the court said:

> "The twentieth request is that the jury be charged that there was no evidence in the case upon which the jury would be justified in returning a verdict against the defendant on the counts of embezzlement. This was a matter wholly within the judge's discretion. He was not obliged to take the question from the jury, however strong may have been his own impres-

sion." (P. 685.)

The alleged error is more conclusively answered in Section 15 below.

Error is also claimed under this same section in the court's denial of defendant's motion for a new trial.

Such action of the trial court is not reviewable on appeal.

Andrews et al vs. U. S., (C. C. A. 9th, 1915), 222 Fed. 418.

Gilbert, J., said:

> "The ruling of the court below in denying the motion of plaintiffs in error for a new trial is not assignaable as error." (P. 419.)

XIV. (Defendant's brief, p. 113.)

The quetsion of whether the crime charged in this indictment is a misdemanor or a felony and whether or not the punishment for the crime defined in Section 5209 has been repealed has heretofore been dealt with and needs no further argument.

XV. Defendant's brief, p. 114.)

It is finally claimed that the evidence does not show that the defendant is guilty of abstraction, and to prove this point defendant cities the testimony, (Brief, p. 115), of David Hull, wherein Hull states that he authorized the defendant Sheridan to take $500.

As to Mrs. Verrell signing the so-called release authorizing an act which had already been committed, the witness explained that she did so after interviewing the defendant, and his assurance to her that the letter was all right (Tr., p. 80.) The defendant Sheridan told her before she received this letter that she should sign it. (Tr., p. 78, 88.)

This statement is corroborated, to some extent, by the defendant's testimony (Tr., p. 218.)

In determining whether or not there is sufficient evidence to sustain the verdict the Circuit Court of Appeals can determine only the question of whether there is **any** evidence to sustain the verdict.

> Hedderly vs. U. S., (C. C. A. 9th, 1912), 193 Fed. 551, 571.

And this determination must be made from all the evidence admitted in behalf of both the plaintiff and the defendant.

> Burton vs. U. S., (C. C. A. 'th, 1906), 142 Fed. 57, 59.
>
> Stearns vs. U. S., (C. C. A. 8th, 1907), 152 Fed. 900, 905.

And in the determination of whether there is any evidence to sustain a verdict the Appellate Court need only ascertain from the record whether there is any evidence which **if credited by a jury,** is sufficient to sustain the verdict.

> Boren vs. U. S., (C. C. A. 9th, 1906), 144 Fed. 801, 804.

And that there is sufficient evidence to sustain the verdict of the jury is found in the above reference and quotation from the transcript of record relating to the question of authority which was in reality the real question at issue herein.

Counsel's familiarity with the indictment must have informed him that the charge of wilful and unlawful abstraction by the defendant from the account of David Hill related to $230, and not to this $500 transaction (Tr., p. 6.) And surely authority to take $500 at one time cannot be construed or enlarged into authority to take all or any portion of the remaining money of David Hull.

As to the authority of the defendant to abstract the $230, which sum is charged as abstracted in Count One of the indictment, the defendant's brief makes no comment.

David Hull's testimony with regard to the transaction charged in the indictment was:

> "I hand you a memorandum check dated March 4, 1911, which I have stated to the court forms the basis of Count No. 1 of the indictment, purporting to have been signed by David Hull, reading to the order of B. C. Agee, amount $230, and ask you to look at it and say if you signed it. Did you ever sign that?
>
> Answer. No, sir, I never did.
>
> Question. Did you ever authorize Mr. Sheridan to loan your money to Mr. B. C. Agee?

A. No, sir, I never did." (Tr., p. 41, 42.)

As to the witness David Hull testifying that the so-called release of the bank examiner which is claimed by the defendant as authority for the act already committed, the witness fully explained how he signed this statement; (This brief, p. 10.)

As to Count Four and the authority of defendant Sheridan to abstract the money of Mrs. Laura M. Verrell, there was certainly no authority granted by the depositor to the defendant for the taking of this money, (See testimony Mrs. Verrell, pp. 73-81.)

In conclusion, it is submitted that the indictment herein states a crime which testimony, under proper rules of evidence, has proved, and that the mantle of justice which should rest on all alike, demands an affirmation of the pleading herein as well as the trial proceedings and judgment of the court. The transactions of this defendant relating to the deprivation to the bank of over $42,600, of the money of the First National Bank of Roseburg, should not stand approved.

Respectfully submitted,
CLARENCE L. REAMES,
United States Attorney.

ROBERT R. RANKIN,
Assistant United States Attorney.

APPENDIX A.

Be it remembered that heretofore, towit, on the 14th day of July, A. D., 1885, there was filed in the Circuit Court of the United States for said district a transcript as follows, towit:

The United States of America, in the District Court of the United States for the eastern division of the northern district of Ohio, of the April term, in the year of our Lord one thousand eight hundred and eighty-five.

Northern District of Ohio,
Eastern Division, ss.

The grand jurors of the United States of America, duly impaneled, sworn, and charged to inquire of crimes and offenses within and for the body of the eastern division of the northern district of Ohio, upon their oath, present and find that Stephen A. Northway, late of the division and district aforesaid, heretofore, towit, on the sixteenth day of December, in the year of our Lord one thousand eight hundred and eighty-two, at the county of Ashtabula, in the division and district aforesaid, and within the jurisdiction of this court, was then and there the president and agent of a certain national banking association, towit, "The Second National Bank of Jefferson," which said association had theretofore been duly organized and established and was then existing and doing business at the village of Jefferson and county of Ashtabula, in the division and dis-

trict aforesaid, under the laws of the United States and that he, the said Stephen A. Northway, so then and there, on the date first aforementioned, being president and agent as aforesaid, did then and there, at said village of Jefferson and county of Ashtabula, in the division and district aforesaid, on said sixteenth day of December, in the year of our Lord one thousand eight hundred and eighty-two, wrongfully and unlawfully, and with intent to injure the said association, and without the knowledge and consent thereof, wilfully misapply and convert to his, the said Stephen A. Northway's, own use, certain moneys and funds of the property of said association, of the amount and value of twelve thousand dollars, towit, six thousand dollars in United States notes, commonly called greenbacks, and six thousand dollars in circulating notes of the United States, commonly called national bank notes, and intended to pass and circulate as money, a more particular description of which said United States notes and circulating note aforesaid is to the grand jurors aforesaid unknown, contrary to the form of statute of the United States in such case made and provided, and against the peace and dignity of the United States.

Second Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present and find that the said

Stephen A. Northway heretofore, towit, on the sixteenth day of December, in the year of our Lord one thousand eight hundred and eighty-two, at the county of Ashtabula, in the division and district aforesaid, and within the jurisdiction of this court, was then and there president and agent of a certain national banking association, towit, "The Second National Bank of Jefferson," theretofore duly organized and established, and then existing and doing business at the village of Jefferson and county of Ashtabula, in the division and district aforesaid, under the laws of the United States; and that he, the said Stephen A. Northway, so then and there, on the date first aforementioned, being president and agent as aforesaid, did then and there at said village of Jefferson and county of Ashtabula, in the division and district aforesaid, on said sixteenth day of December, in the year of our Lord one thousand eight hundred and eighty-two, wilfully and unlawfully, and with intent to injure the said national banking association, and without the knowledge and consent thereof, abstract and convert to his, the said Stephen A. Northway's, own use certain moneys and funds of the property of said association, of the amount and value of twelve thousand dollars, towit, six thousand dollars in United States notes, commonly called greenbacks, and six thousand dollars in circulating notes, commonly called national bank notes, and intended to pass and circulate as

money, a more particular description of which said United States notes and circulating notes aforesaid is to the grand jurors aforesaid unknown, contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

I hereby certify that the original of which this is a photostatic print is in the possession of the Library of Congress.

ALLEN R. BOYD,
Chief Clerk,
Library of Congress.

April 20, 1915.

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DIVISION I.

Points, Authorities and Argument
(Indictment)